

## RESOLUTION 10-02-2011

### DIGEST

#### Pesticide Regulation: Alternative Commissioner to Adjudicate Civil Penalties

Amends Food and Agricultural Code section 12999.5 to allow for the appointment of an alternative commissioner to determine civil penalties in the event of a conflict of interest.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Food and Agricultural Code section 12999.5 to allow for the appointment of an alternative commissioner to determine civil penalties in the event of a conflict of interest. This resolution should be approved in principle because there is currently no structure in place to address a situation where the commissioner in a specific county has a conflict of interest.

Under the scheme articulated by the Food & Agriculture Code, there is a department of the California Department of Environmental Protection known as the Department of Pesticide Regulation. The Governor appoints the director, who then qualifies persons for appointment as commissioners by county boards of supervisors. There is no more than one commissioner per county, and some counties are served by a commissioner from another county or by the Director of Pesticide Regulation directly.

In addition to providing criminal penalties for the mishandling of pesticides, Food & Agriculture Code section 12999.5 provides that the commissioner in each county (and apparently only such commissioner) has the discretion to levy civil penalties against persons who mishandle pesticides. The problem this resolution seeks to address is what should occur in the event the commissioner for a given county feels a conflict of interest that would impinge on his or her ability to properly exercise such discretion in a specific situation. As the law now stands, there is no alternative procedure to deal with this inability to act, where such commissioner disqualifies him or herself. Given the fact that the director qualifies the commissioners to serve, it makes sense to allow the director to appoint an alternative commissioner to address the matter.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Food and Agricultural Code section 12999.5 to read as follows:

- 1 § 12999.5
- 2 (a) In lieu of civil prosecution by the director, the commissioner, (or in case of a conflict
- 3 of interest determined by that commissioner, another commissioner designated by the director)
- 4 may levy a civil penalty against a person violating Division 6 (commencing with Section 11401),

5 Article 10 (commencing with Section 12971) or Article 10.5 (commencing with Section  
6 12980) of this chapter, Section 12995, Article 1 (commencing with Section 14001) of Chapter 3,  
7 Chapter 7.5 (commencing with Section 15300), or a regulation adopted pursuant to any of these  
8 provisions, of not more than one thousand dollars (\$1,000) for each violation. Any violation  
9 determined by the commissioner to be a serious violation as defined in Section 6130 of Title 3 of  
10 the California Code of Regulations is subject to a fine of not more than five thousand dollars  
11 (\$5,000) for each violation. It is unlawful and grounds for denial of a permit under Section 14008  
12 for any person to refuse or neglect to pay a civil penalty levied pursuant to this section once the  
13 order is final.

14 (b) If a person has received a civil penalty for pesticide drift in a school area subject to  
15 Section 11503.5 that results in a serious violation as defined in subdivision (a), the commissioner  
16 shall charge a fee, not to exceed fifty dollars (\$50), for processing and monitoring each  
17 subsequent pesticide application that may pose a risk of pesticide drift made in a school area  
18 subject to Section 11503.5. The Agricultural Commissioner shall continue to impose the fee for  
19 each subsequent application that may pose a risk of drift, until the person has completed 24  
20 months without another serious violation as defined in subdivision (a).

21 (c) Before a civil penalty is levied, the person charged with the violation shall be given a  
22 written notice of the proposed action including the nature of the violation and the amount of the  
23 proposed penalty, and shall have the right to request a hearing within 20 days after receiving  
24 notice of the proposed action. A notice of the proposed action that is sent by certified mail to the  
25 last known address of the person charged shall be considered received even if delivery is refused  
26 or the notice is not accepted at that address. If a hearing is requested, notice of the time and place  
27 of the hearing shall be given at least 10 days before the date set for the hearing. At the hearing,  
28 the person shall be given an opportunity to review the commissioner's evidence and to present  
29 evidence on his or her own behalf. If a hearing is not timely requested, the commissioner may  
30 take the action proposed without a hearing.

31 (d) If the person upon whom the commissioner levied a civil penalty requested and  
32 appeared at a hearing, the person may appeal the commissioner's decision to the director within  
33 30 days of the date of receiving a copy of the commissioner's decision. The following procedures  
34 apply to the appeal:

35 (1) The appeal shall be in writing and signed by the appellant or his or her authorized  
36 agent, state the grounds for the appeal, and include a copy of the commissioner's decision. The  
37 appellant shall file a copy of the appeal with the commissioner at the same time it is filed with  
38 the director.

39 (2) The appellant and the commissioner may, at the time of filing the appeal or within 10  
40 days thereafter or at a later time prescribed by the director, present the record of the hearing  
41 including written evidence that was submitted at the hearing and a written argument to the  
42 director stating grounds for affirming, modifying, or reversing the commissioner's decision.

43 (3) The director may grant oral arguments upon application made at the time written  
44 arguments are filed.

45 (4) If an application to present an oral argument is granted, written notice of the time and  
46 place for the oral argument shall be given at least 10 days before the date set therefor. The times  
47 may be altered by mutual agreement of the appellant, the commissioner, and the director.

48 (5) The director shall decide the appeal on the record of the hearing, including the written  
49 evidence and the written argument described in paragraph (2), that he or she has received. If the

50 director finds substantial evidence in the record to support the commissioner's decision, the  
51 director shall affirm the decision.

52 (6) The director shall render a written decision within 45 days of the date of appeal or  
53 within 15 days of the date of oral arguments or as soon thereafter as practical.

54 (7) On an appeal pursuant to this section, the director may affirm the commissioner's  
55 decision, modify the commissioner's decision by reducing or increasing the amount of the  
56 penalty levied so that it is within the director's guidelines for imposing civil penalties, or reverse  
57 the commissioner's decision. Any civil penalty increased by the director shall not be higher than  
58 that proposed in the commissioner's notice of proposed action given pursuant to subdivision (c).  
59 A copy of the director's decision shall be delivered or mailed to the appellant and the  
60 commissioner.

61 (8) Any person who does not request a hearing pursuant to subdivision (c) may not file an  
62 appeal pursuant to this subdivision.

63 (9) Review of a decision of the director may be sought by the appellant within 30 days of  
64 the date of the decision pursuant to Section 1094.5 of the Code of Civil Procedure.

65 (e) The commissioner may levy a civil penalty pursuant to subdivisions (a), (c), and (d)  
66 against a person violating paragraph (1), (2), or (8) of subdivision (a) of Section 1695 of the  
67 Labor Code, which pertains to registration with the commissioner, carrying proof of that  
68 registration, and filing changes of address with the commissioner.

69 (f) After the exhaustion of the appeal and review procedures provided in this section, the  
70 commissioner or his or her representative may file a certified copy of a final decision of the  
71 commissioner that directs the payment of a civil penalty and, if applicable, a copy of any  
72 decision of the director or his or her authorized representative rendered on an appeal from the  
73 commissioner's decision and a copy of any order that denies a petition for a writ of  
74 administrative mandamus, with the clerk of the superior court of any county. Judgment shall be  
75 entered immediately by the clerk in conformity with the decision or order. No fees shall be  
76 charged by the clerk of the superior court for the performance of any official service required in  
77 connection with the entry of judgment pursuant to this section.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** San Diego County Bar Association

## **STATEMENT OF REASONS**

Existing Law: The current Food and Agriculture Code confers the authority on county Agricultural Commissioners to levy civil penalties involving violations of sections of the California Food and Agricultural Code and any regulations in the California Code of Regulations relating to Pesticides or Pest Control.

This Resolution: This resolution amends Food and Agriculture Code section 12999.5 to allow for the Director of the Department of Pesticide Regulation (DPR) to bring an administrative civil penalty action when the County Agricultural Commissioner determines that he or she has a direct conflict of interest.

The Problem: Under the current statute, when there is a potential conflict of interest because an employee of the Commissioner may be a victim of the violation, no provision is made for another Agricultural Commissioner to enforce the violation. Ordinarily, Agricultural Commissioners are only authorized to bring civil penalty actions within their own counties. Authorizing the Director of DPR to designate another Agricultural Commissioner from any other county to bring the action against the respondent would relieve the conflicted Agricultural Commissioner of bringing an action that could have serious repercussions and involve even more resources than would be otherwise necessary to deal with appeal issues or other ramifications.

This resolution will provide consistency in the ability of the county Agricultural Commissioners to enforce actions when there is a probable conflict of interest as determined by the affected Agricultural Commissioner.

**IMPACT STATEMENT**

This resolution does not impact any other law, statute or rule.

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